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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF ARIZONA,
Petitioner,

vs.

RICHARD F. YOUNG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE

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QUESTIONS PRESENTED

I

IS THE PROCESS OF INVESTIGATIVE HYPNOSIS SO UNRELIABLE SO AS TO RENDER A WITNESS WHO HAS BEEN HYPNOTIZED INCOMPETENT TO TESTIFY ABOUT MATTERS RECALLED DURING HYPNOSIS?

II

DOES *MINCEY V. ARIZONA*, 437 U.S. 385 (1978), REQUIRE THE SUPPRESSION OF ALL TANGIBLE EVIDENCE SEIZED FROM A MURDER SCENE (A PUBLIC BAR) WHERE A STATE DEFENDANT WHO IS AN EMPLOYEE IN THE BAR FAILS TO SATISFY HIS BURDEN OF PROOF THAT HE POSSESSED A REASONABLE EXPECTATION OF PRIVACY IN THE PREMISES SEARCHED?

PARTIES TO THE PROCEEDING

Petitioner:
THE STATE OF ARIZONA

Respondent:
RICHARD F. YOUNG*

*Respondent is an individual.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE

Now Comes the State of Arizona, by Herbert E. Williams, Deputy Maricopa County Attorney, and Michael D. Jones, Special Deputy Maricopa County Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Arizona, Division One, entered in the above-entitled cause on December 28, 1982, Petition for Review denied by the Arizona Supreme Court on March 29, 1983.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One, is reported at _____ Ariz. _____, 661 P.2d 1138, and is appended as Exhibit A. The order denying the Motion for Rehearing is appended as Exhibit B. The order denying the Petition for Review is appended as Exhibit C. The Superior Court's order granting defendant's Motion to Suppress is appended as Exhibit D.

STATEMENT OF JURISDICTION

The constitutional issue was raised in the Superior Court of Maricopa County by Motion to Suppress. The Superior Court is the trial court. The Court ordered all evidence suppressed on August 14, 1980. (Appendix D)

The State of Arizona filed its timely appeal to the Arizona Court of Appeals, Division One and judgment on that appeal was entered December 28, 1982. (Appendix A) The state moved for a rehearing which was denied on February 28, 1983 (Appendix B)

A timely petition for review to the Arizona Supreme Court was filed. It was denied on March 30, 1983. (Appendix C)

This petition was filed within 60 days thereof.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF FACTS

Respondent, Richard F. Young, was charged with the crime of First Degree Murder. Young was the bartender in a Phoenix bar called The Leprechaun Lounge when, during the evening hours of October 26, 1978, Young and a customer, Don Jason, became involved in an argument. The men engaged in a fight that was broken up by a barmaid, Diana Armstrong. After the fight, Young walked behind the bar and removed a gun from the cash register. Young fired a shot that struck Jason in the chest. Jason fell and attempted to crawl into a restroom. Young's second shot caught Jason in the back.

Grace Gillespie was the owner of the Leprechaun Lounge; she and Richard F. Young were dating. The Phoenix police were called because Mrs. Gillespie wanted them there as quickly as possible. The police arrived at approximately 11:00 p.m.

The murder weapon was found in the ceiling of the Leprechaun Lounge, hidden by a movable section of the ceiling tile. Detective Ron Quaife of the Phoenix Police Department observed a piece of handkerchief hanging from the edge of the ceiling tile, and he noticed that the ceiling tile itself was not in place. The gun was found wrapped in the handkerchief. The trial court granted a Motion to Suppress all tangible evidence seized at the scene of the crime because the Phoenix Police Department had failed to obtain a search warrant. The physical evidence suppressed included the gun, the handkerchief wrapped around the gun, two shell casings from the murder weapon, and numerous photographs of the murder scene, all found or taken in the public area of the bar.

The trial court also granted a Motion to Suppress portions of Diana Armstrong's testimony that were

recalled as a result of a hypnosis session. Subsequent to the homicide on October 26, 1978, Ms. Armstrong made eight statements, the last one, on November 21, 1978, under the influence of hypnosis. The hypnosis session was conducted by a specially trained police officer and the entire hypnosis session was videotaped. Hypnosis was successful in allowing Ms. Armstrong to relax and recall details that she had never recalled previously: (1) Richard Young had initiated the confrontation between himself and Don Jason by pointing his finger in Jason's face; (2) Jason was not moving towards Young at the time he was first shot; (3) after shooting Jason, Young dipped the gun in water and wiped it clean with a bar rag; (4) Young made the statement, "Sid got away with it, why can't I?"; (5) Young made the statement, "Nobody beats my ass." The trial court had previously noted that most of the information elicited from Ms. Armstrong while under hypnosis could be corroborated by comparison with her previous seven pre-hypnosis statements. And, most of the "new" information elicited had never been the subject of close interrogation previously, or the "new" information clarified previous statements made by Ms. Armstrong. Additionally, the trial court noted that statements by Grace Gillespie corroborated some of the new information obtained from Diana Armstrong under hypnosis.

In an opinion filed on December 28, 1982, and attached as Exhibit A, the Arizona Court of Appeals affirmed the trial court's order suppressing all evidence seized at the Leprechaun Lounge except photographs, which the Court held to be admissible subject to the satisfaction of normal foundational prerequisites. The Court of Appeals also ruled that Diana Armstrong would not be permitted to testify about those matters recalled during hypnosis, and her testimony must be limited to those matters recalled and related prior to hypnosis.

REASONS FOR GRANTING THE WRIT

I

HYPNOSIS DOES NOT RENDER A WITNESS INCOMPETENT TO TESTIFY ABOUT MATTERS RECALLED DURING A HYPNOSIS SESSION.

Hypnosis is a valuable tool to law enforcement in enhancing or retrieving lost memories of traumatized witnesses. Respondent has admitted this. In fact, both Respondent's expert and the expert called by the State of Arizona agree that hypnosis can be an effective aid to recall. And, of course it is well recognized in the scientific community that hypnosis is an effective aid to memory recall. Kroger and Douce, *Hypnosis and Criminal Investigation*, 27 INT.J.CLIN.EXP.HYPN. 358-74 (1979); L. LECRON, INTRODUCTION TO EXPERIMENTAL HYPNOSIS (1965); Rosenthal, *Hypnotic Recall of Material Learned Under Anxiety and Non-Anxiety Producing Conditions*, 34 EXPER.PSYCHOLOGY, 369-89 (1944); Schafer and Rubio, *Hypnosis to Aid the Recall of Witnesses*, 26 INT.J.CLIN.EXP.HYPN. 81-91 (1978); Stalnaker and Riddle, *The Effect of Hypnosis on Long Delayed Recall*, 6 GEN.PSYCH. 429-40 (1932). *See* NOYES AND KLOB, MODERN CLINICAL PSYCHIATRY, 603 (1973); WOLBERG, AMERICAN HANDBOOK OF PSYCHIATRY, Chapter 12 (Artieti Ed. 1974); H. Spiegel, *Hypnosis: An Adjunct to Psychotherapy*, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, Section 34.34 (Freedman and Caplan, Eds. 1967), as cited in *People v. Smrekar*, 358 N.E.2d 848, 853 (Illinois, 1979).

Hypnosis is effective because the subject remembers details that were blocked out due to the stress or trauma of a crime situation. This is so, because, in a

traumatic situation, the subject focuses his or her attention on the incidents most threatening to themselves, and details or peripheral incidents, although seen, are often overshadowed by more violent recollections. And, many times, the subject is afraid to remember those violent recollections. Thus, through relaxation, and viewing the event as though on a television screen, hypnosis acts as an aid to a recall of those peripheral incidents that may be significant to law enforcement.

Hypnosis is an altered state of consciousness. But hypnosis is not an unnatural process: sleep, daydreaming, and momentary periods of inattention are also altered states of consciousness. Hypnosis is characterized by a mental state of concentration and a physical state of relaxation. During hypnosis a subject does not do anything that he or she would not normally want to do. In fact, the subject is aware of everything that is happening during hypnosis, and can come out of the state anytime he or she wants to. A subject is not controlled in any sense of the word, even though the subject is susceptible to increased suggestions. People may confabulate, or fill in the blanks of their memory with fantasies, if they are motivated to do it in hypnosis. People may lie or distort facts while under hypnosis. A subject may do, think, recall, or say anything in hypnosis, just as in the "normal" waking state. So, hypnosis must never be confused with the so-called truth determinants, such as the polygraph or truth serums.

In ruling that Diana Armstrong could not testify about matters recalled during hypnosis, and that her testimony would be limited to matters recalled and related prior to hypnosis, the Arizona Court of Appeals followed the rule set forth by the Arizona Supreme Court in *State ex. rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982). In that case the

Arizona Supreme Court applied a per se rule of inadmissibility concerning any hypnosis-developed statements because of the "inherent unreliability of the hypnosis process". A strongly divided Arizona Supreme Court has persisted in ignoring the scientific evidence and authorities who approve of the use of investigative hypnosis and have proposed guidelines for its use. Following an overabundance of caution, the Arizona Supreme Court fears that a witness' memory may be unalterably changed, or strengthened, so as to deny a defendant in a criminal trial his constitutional right of confrontation. The Court has ignored authorities who point out that the likelihood of this occurring during hypnosis is no greater than what might occur as a result of a normal interview situation, or a deposition. In fact, there is only one scientific authority that may be discovered in the scientific literature that would endorse such an absurd proposition.

The facts of the instant case show that a complete record of the hypnosis session was made by videotaping from beginning to end. This videotape was made available to Respondent Young and his attorneys. The questions of unnecessary suggestions, or prompting, during the hypnosis session, if any at all occurred, was available for any and all to observe on the videotape. The issue of improper suggestion was the subject of a lengthy hearing conducted by the trial court in which many expert witnesses testified after viewing the videotape. Dr. Martin Orne, testifying for Respondent, admitted that hypnosis has a place in the criminal investigation process, citing the example in ChowChilla, California, in which a school bus was hijacked, the children and bus driver kidnapped and buried for a lengthy period of time. In that case hypnosis successfully assisted the bus driver to remember the license plate number of a van driven by the kidnappers. Dr. Orne also testified about his

proposed guidelines for the use of investigative hypnosis, and the trial court concluded that the State of Arizona had substantially complied with those procedures.

In conclusion, it is respectfully submitted that the Arizona Court of Appeals and the Arizona Supreme Court has committed a grave error concerning the reliability of the hypnosis process. The misconceptions concerning hypnosis as magic, or form of entertainment, must be disassociated from its use in the instant case as a technique to assist a witness in recalling details surrounding a crime. Respondent Young will not be denied his Sixth Amendment right to confrontation of witnesses if Diana Armstrong would be permitted to testify about matters recalled during the hypnosis session, because that session was videotaped, and is presently available for use by Young for cross examination purposes.

II

MINCEY V. ARIZONA, 437 U.S. 385 (1978), DOES NOT REQUIRE THE SUPPRESSION OF ALL TANGIBLE EVIDENCE SEIZED FROM A MURDER SCENE (A PUBLIC BAR) WHERE A STATE DEFENDANT WHO IS AN EMPLOYEE IN THE BAR FAILS TO SATISFY HIS BURDEN OF PROOF THAT HE POSSESSED A REASONABLE EXPECTATION OF PRIVACY IN THE PREMISES SEARCHED.

The Arizona Court of Appeals has mistakenly extended the rule promulgated by this Court in *Mincey v. Arizona*, 437 U.S. 385 (1978), to confer standing upon an employee to object to warrantless searches and seizures made in area open to the public where the police had been summoned at the request of the bar's

owner. Presumably, the Arizona Court has failed to understand the distinction between a search and seizure that lasts for many days after an unannounced police entry into an individual's dwelling, and the typical homicide investigation where the police are summoned to enter a dwelling or business under emergency circumstances.

A. *Property owner's consent to a search and seizure may be presumed where such owner requests the police to enter and conduct an investigation.*

When Grace Gillespie requested the police to come to her bar, the Leprechaun Lounge, after Don Jason's shooting, she not only consented to their entrance onto those premises, but she impliedly gave her consent to their investigation. Having been called to the Leprechaun Lounge, the Phoenix Police Department was legitimately on the premises. Mrs. Gillespie admitted that she did indeed want the police to come inside the bar; in fact she wanted them to come there as soon as possible. Mrs. Gillespie never objected to the scope or the duration of the Phoenix Police Department's search of the Leprechaun Lounge.

It should be unnecessary for an investigating officer to request permission from the owner of premises searched to continue an investigation that was commenced at the behest of such owner. So, unlike the situation in *Mincey v. Arizona, supra,* the initial intrusion into the premises later searched was not based upon an emergency situation, but rather commenced on invitation by the property owner.

B. *Young did not possess an expectation of privacy in the premises searched.*

Richard F. Young, the bartender at the Leprechaun Lounge, did not have a sufficient interest in the

premises searched so as to validly assert an objection to that search and seizure. In *Mancusi v. DeForte*, 392 U.S. 364 (1968), this Court determined that an employee of a union who shared an office with other employees did have a sufficient expectation of privacy so as to validly object to a search of his office. However, the area in the instant case that was searched was not Young's office or an office that he shared with other employees. The search took place in a public area of the Leprechaun Lounge. The place where Young hid the gun was not even an area of his own domain, such as behind the bar itself, or a personal locker or closet. The searched areas were places of public domain in which Young could not have reasonably expected the degree of privacy he now claims.

The Arizona Court of Appeals noted that ownership is a factor to be considered in determining interest in premises searched. (See Appendix A, at 9.) However, Richard F. Young was not an owner of the Leprechaun Lounge. In his testimony Richard Young admitted that he was not a "hidden owner", and that he only had a "verbal agreement" to take over the bar from Mrs. Gillespie "after it got out of the red". Of Young's proprietary interest in the bar the Arizona Court noted: "Both Mrs. Gillespie and the Defendant testified that at some time in the future the Defendant might take over the business and the lease." (See Appendix A, at 8-9). Expectations of possible property interest do not confer present proprietary status so as to enable Richard F. Young to object to the search of the premises of the Leprechaun Lounge.

The mere fact that Richard F. Young was the boyfriend of Grace Gillespie, the married owner of the Leprechaun Lounge, is of no moment. Sexual relationships do not confer proprietary interests.

C. *Young had no legitimate expectation of privacy in the ceiling tiles of the bar.*

Richard F. Young possessed no legitimate expectation of privacy in the ceiling tiles he used to conceal the murder weapon wrapped in a handkerchief. Young admitted that he hid the gun in the ceiling after he became excited. He did not testify that he regularly used the ceiling to conceal his personal effects, and no evidence was presented that he had been given permission on that occasion by the bar's owner to use the ceiling. Where a person's only intent is to hide incriminating evidence, any expectation of privacy that such evidence will not be discovered by the police is not "legitimate." In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court recognized the principle that a subjective expectation of not being discovered by the police is not a legitimate expectation of privacy entitled to Fourth Amendment protection:

> Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one that the law recognizes as "legitimate." His presence, in the words of *Jones*, 362 U.S. at 267, 80 S.Ct. at 734, is "wrongful"; his expectation is not "one that society is prepared to recognize as reasonable." (citations omitted)

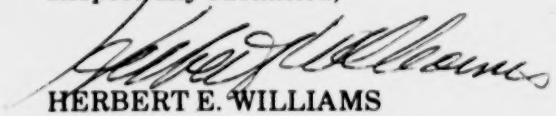
439 U.S. 143, Note 12.

Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted to correct the erroneous extension of Fourth Amendment principles enunciated by this Court in *Mincey v. Arizona, supra,* and the concept of reasonable expectation of privacy enunciated in *Rakas v. Illinois, supra.*

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,



HERBERT E. WILLIAMS
Deputy Maricopa County Attorney

MICHAEL D. JONES
Special Deputy
Maricopa County Attorney

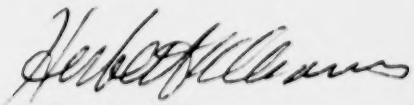
Dated: May 19, 1983

MDJ:rt

CERTIFICATION

Herbert E. Williams, being duly admitted to practice before the Supreme Court of the United States of America, herewith certifies that three copies of the petition have been delivered to Thomas A. Thinnes, Attorney for Richard F. Young, at 1005 North 2nd Street, Phoenix, Arizona.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.



Herbert E. Williams

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Opinion of the Arizona Court of Appeals, Division One

STATE OF ARIZONA,

Appellant,

vs.

RICHARD F. YOUNG,

Appellee.

An Appeal from the Superior Court of Maricopa County
Cause No. CR-106652
Filed: December 28, 1982 Glen D. Clark, Clerk
1 CA-CR 4956 Department B

Grant, Judge: —

OPINION

Before The Honorable Rufus C. Coulter, Jr., Judge*

* The Honorable Richard M. Davis, a Judge *pro tempore* of a court of record, has been authorized to participate in this matter by the Chief Justice of the Arizona Supreme Court, pursuant to Arizona Const. art. VI, § 20.

This is an appeal by the State of Arizona from two pretrial orders entered by the trial court. The first order precluded the state's primary witness to the homicide from testifying because she had been placed under hypnosis. The second order granted the motion of defendant to suppress all evidence found at the scene of the homicide other than the victim's body.

The facts leading to defendant's indictment for first degree murder reflect that on the evening of October 26, 1978, the defendant and the victim, Donald Jason, engaged in a physical fight in the Leprechaun Lounge in Phoenix, Arizona. The fight stopped when a barmaid, Diana Armstrong, threatened to call the police. Defendant, who was the head bartender, walked behind the bar, took out a pistol and shot the victim in the chest. When the victim turned and staggered towards a restroom, the defendant fired a second shot into the victim's back. The victim fell to the floor fatally wounded.

The owner of the bar, Grace Gillespie, called the police and reported the shooting. Before the police arrived, the defendant wrapped the pistol in a handkerchief and hid it behind a tile of the bar's dropped ceiling. Two police officers arrived a few minutes later, secured the scene and waited until homicide detectives arrived before gathering any physical evidence.

Approximately one hour after the scene was secured, homicide detectives conducted a search of the bar and took photographs of the scene. When one of the officers noticed a portion of a handkerchief hanging down from the ceiling, he moved the ceiling tile and retrieved the hidden pistol.

Subsequent to the homicide, Diana Armstrong made eight separate statements including one on November 21, 1978, when she was placed under hypnosis by a police detective trained in the use of hypnosis. Prior to trial the defendant filed a motion *in limine* seeking to preclude the state from calling Diana Armstrong as a witness at trial because of the potential taint resulting from the hypnosis. The trial court granted the motion based upon *State v. La Mountain*, 125 Ariz. 547, 611 P.2d 551 (1980).

The defendant also filed a pretrial motion to suppress the pistol, the handkerchief, shell casings and photographs taken at the scene on the ground that no search warrant had been obtained after the homicide scene was secured as required by *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The state responded that the motion to suppress was untimely filed, that the search was conducted pursuant to the owner's consent and that the defendant suffered no personal fourth amendment violaton as required by *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The trial court found that the state had not met its burden of showing that the search was lawful and therefore granted the defendant's motion to suppress.

I. HYPNOSIS ISSUE

The state's first argument on appeal requests this court to limit the cases of *State v. La Mountain, supra*, and *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981) to their facts and not adopt a *per se* rule precluding a witness from testifying after hypnosis has been used to refresh the witness's memory. At the time of the hearing below, the only Arizona Supreme Court opinion dealing with hypnosis was *State v. La Mountain*. In that case the supreme court stated:

> Although we perceive that hypnosis is a useful tool in the investigative stage, we do not feel the state of the science (or art) has been shown to be such as to admit testimony which may have been developed as a result of hypnosis. A witness who has been under hypnosis, as in the case here, should not be allowed to testify when there is a question that the testimony may have been produced by that hypnosis.

125 Ariz. at 551, 611 P.2d at 555. The supreme court held in *La Mountain*, however, that the admission of hypnotically-refreshed testimony in that case was harmless because the evidence against the defendant was overwhelming. *La Mountain* thus did not require absolute preclusion of testimony by witnesses who had been hypnotized as that rule was subsequently set forth in *State v. Mena, supra*, nor did it follow the modified rule as set forth in *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (supplemental opinion filed May 4, 1982).[1] In *Collins II* the Arizona Supreme Court relaxed the rule of absolute preclusion of hypnotized witnesses' testimony enunciated in *Mena* and *Collins I*, to allow a previously hypnotized witness to testify to the extent of his pre-hypnotic recall, provided that this pre-hypnotic recall had been appropriately recorded before hypnosis, and the hypnosis procedures were performed in a manner designed to minimize the danger of contamination of both pre-hypnotic and post-hypnotic recall.

1. The original *Collins* opinion will be hereafter referred to as *"Collins I"*, and the supplemental opinion as *"Collins II."*

We must consider then whether the law on hypnotic testimony as developed in *Mena* and *Collins I and II* should be applied to this case. In addressing the retroactivity question in *Collins I* the supreme court held as follows:

> We hold that any person hypnotized post-*Mena* is incompetent to testify. Any person hypnotized pre-*Mena* but who testified post-*Mena* or who has not yet testified is incompetent to testify. We further hold that any conviction presently in the appeals process in which there was hypnotically recalled testimony and where the testimony and hypnosis took place pre-*Mena* will be examined on a case-by-case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction. In other words, the question in these cases is whether the introduction of posthypnotic testimony was harmless error.

132 Ariz. at 190, 644 P. 2d at 1276. In this case, the hypnosis took place pre-*Mena*, and the witness has not yet testified. Therefore, it appears that *Collins I* would require that the witness be precluded from testifying.

The issue, however, is further complicated when the supreme court's subsequent decision in *Collins II* is considered. Surprisingly, the opinion in *Collins II*, unlike *Collins I*, completely omits any discussion of whether *Collins II* is to be given limited retroactive application.

In his dissent in *Collins II*, Justice Gordon "[presumes] because the majority failed to address the prospective/retrospective application of the rule it sets today that the holding is prospective only," citing his

discussion of this question in the majority opinion in *Collins I.* We assume that by this comment Justice Gordon is suggesting that the prospective/retrospective line drawing be done in accordance with the above-quoted guidelines which he developed in *Collins I* and which he recognized as "not purely prospective." In our opinion these guidelines might more properly be characterized as contemplating the application of a limited retroactive standard. Thus, the application of *Collins I* would be prospective only in the sense that it would not be applied so as to invalidate convictions which have become final. On the other hand, it would apply to convictions which have not become final because of pending appeals. To that extent it would be given a limited retroactive effect in accordance with the general rule that when there is a change of law by judicial decision between the time of trial and appeal, the appellate court will dispose of the appeal according to the law prevailing at the time of the appellate disposition. *Arnold v. Knettle,* 10 Ariz.App. 509, 460 P.2d 45 (1969).

From the foregoing we conclude that in this appeal we must review the record and apply the principles developed in *Collins II.*[2] Pursuant to *Collins II,* a hypnotized witness can testify to matters she was able to recall and relate to the authorities prior to hypnosis if the foundational requirements of *Collins II* have been established. In our opinion there is implicit in *Collins II* a requirement that the issue of admissibility of pre-hypnotic recall be presented to the trial court for determination prior to the admission of testimony.

2. Our conclusion in this regard is fortified by the Arizona Supreme Court's most recent opinions dealing with hypnosis issues, *State v. Stolp,* (No. 5397, filed June 2, 1982), and *State v. Encinas,* 132 Ariz. 493, 647 P.2d 624.

This issue has not yet been presented to the trial court. It is clear however that *Collins II* prohibits the introduction of statements made during or after hypnosis. In *Collins II*, the supreme court stated that failure to so limit the testimony of the hypnotized witness would be reversible error if prejudicial. Therefore, as to this issue *the order of the trial court precluding Diana Armstrong from testifying as to matters contained in statements made during or post-hypnosis is affirmed.* However, Diana Armstrong may testify to pre-hypnosis statements if the trial court determines such testimony meets the requirements set forth in *Collins II* as we have applied it to this case.

The defendant also claims that the state waived the right to appeal the hypnosis issue. We find no support in the record for this contention.

II. SEARCH ISSUE

The state's second argument is that the trial court erred in granting the defendant's motion to suppress. The state argues that the motion to suppress was not filed within the time limits of rule 16.1(b), Rules of Criminal Procedure, that the warrantless search was authorized by the owner's consent and that the defendant suffered no personal fourth amendment violation.

Under *Mincey v. Arizona*, it is clear that once the homicide scene had been secured, the police were without authority to conduct a general search of the premises without a warrant absent either consent or some other recognized exception to the warrant clause of the fourth amendment. We agree with the trial court that the evidence does not support a finding that the owner, Grace Gillespie, consented to a wholesale search of the premises merely by calling the police to the homicide scene or because the bar was a public establishment. As stated in *Lo-Ji Sales, Inc. v. New*

York, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920, 930 (1979):

> The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against a governmental intrusion, see *Rakes v. Illinois*, [citation omitted], and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees.

See also Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). While Mrs. Gillespie consented to the initial entry, there is nothing to support an inference of consent to search the ceiling.

We agree with the trial court's obvious conclusion that the defendant had a legitimate expectation of privacy against governmental intrusion into the bar or the dropped ceiling. *See Rakas v. Illinois, supra.* In *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) the supreme court expanded on the reasonable expectation of privacy test announced in *Rakas*. The court stated that the test involves two questions. First, whether the individual, by his conduct, exhibited an actual (subjective) expectation of privacy. Second, whether the subjective expectation of privacy is one that society is prepared to recognize as reasonable, i.e., whether the subjective expectation, viewed objectively, is justifiable under the circumstances.

Here, the defendant exhibited an actual expectation of privacy by the very act of hiding the pistol in the

ceiling. Viewed objectively we find that the expectation was justifiable under the circumstances. Both Mrs. Gillespie and the defendant testified that at some time in the future the defendant might take over the business and the lease. At the time of the shooting, defendant was acting as a manager or head bartender and shared control of the premises with Mrs. Gillespie. From the evidence presented the trial court could find that defendant owned the pistol and had a proprietary interest in the bar. Ownership is a strong factor to be considered. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

In a case quite similar on its facts the United States Court of Appeals for the First Circuit held that a warrantless search of the space above an open ceiling tile in the bathroom of a recently arrested drug suspect's motel room violated the suspect's fourth amendment rights. *United States v. Irizarry*, 673 F.2d 554 (1st Cir. 1982). It is clear in the instant case that the premises had been secured therefore no exigent circumstances existed, the gun was not in "plain view", and the state does not propose that this was a search incident to an arrest. The defendant had a legitimate expectation of privacy in the area searched and therefore the exclusionary rule was properly applied. We agree with the trial court that the state failed to offer evidence that any of the items seized were in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Therefore we have no choice but to affirm the suppression of all evidence seized. With regard to the photographs however, we note that they are generally admissible if the things which they depict may be testified to by a witness. In other words a witness may describe what he saw and illustrate his testimony with photographs. However, the photographs are not admissible by themselves as original or substitute evidence. 23 C.J.S. Criminal Law § 852, *Viliborgh v. State*, 45 Ariz. 275, 43

P.2d 210 (1935); *State v. Snodgrass*, 121 Ariz. 409, 590 P.2d 948 (App. 1979); *State v. Kleier*, 69 Idaho 278, 206 P.2d 513 (1949).

The state also claims that the motion to suppress was not timely filed. Rule 16.1, Arizona Rules of Criminal Procedure, provides in part:

> b. *Making of Motions Before Trial.* All motions shall be made no later than 20 days prior to the date set for trial. Lack of jurisdiction may be raised at any time.
>
> . . . .
>
> c. *Effect of Failure to Make Motions in Timely Manner.* Any motion, defense objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefore was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

The 20 day requirement in rule 16.1(b), Arizona Rules of Criminal Procedure, has been interpreted to mean that pretrial motions must be filed 20 days prior to the *first trial date. State v. Superior Court* (McKenzie), 127 Ariz. 175, 619 P.2d 3 (1980). The resetting of a trial date, pursuant to a continuance, does not change the date by which pretrial motions must be filed, unless the trial court so orders. *Id.*

Appellee was arraigned on May 7, 1979, and his trial date was set for June 21, 1979. The trial court's minute entry dated May 7, 1979, states that the deadline date for all motions was June 1, 1979. Appellee filed his motion to suppress on August 14, 1980, nearly 14 months after the original trial date.

However, the McKenzie opinion was not filed until October 7, 1980, almost two months later. Under the circumstances of this case and the inherent unfairness of applying *McKenzie* retroactively we conclude that the motion to suppress was timely filed under rule 16.1 as it was then construed. *See State v. Post*, 121 Ariz. 579, 592 P.2d 775 (1979); *State v. Lee*, 25 Ariz. App. 220, 542 P.2d 413 (1975).

The order granting appellee's motion *in limine* regarding testimony of Diana Armstrong is affirmed in part and remanded for further evidentiary hearing. The order granting appellee's motion to suppress is affirmed.

SARAH D. GRANT, Judge

CONCURRING:

EINO M. JACOBSON, Judge

DAVIS, Judge, *pro tempore*, dissenting in part.

I disagree with my colleagues' conclusion that the gun must be suppressed. In my view, the appellee did not carry the burden of showing that he had what used to be called "standing" and what is not referred to as a reasonable expectation of privacy in the ceiling of the bar, so as to entitle him to the protection of the Fourth Amendment.

Initially, I cannot suppress a comment upon the parties' arguments with respect to *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Apart from the United States Supreme Court's rigid and broadly comprehensive *per se* rule expressed in *Mincey* and some of its antecedents, the search at issue in this case strikes me as a reasonable one. Certainly, this search by police officers summoned to the scene at the behest of the owners and licensee of record to

investigate a shooting and killing is a long country mile from the writs of assistance and other intrusive indignities forced upon the colonists which provided the impetus for the Fourth Amendment. As the United States Supreme Court has upon occasion recognized, the Fourth Amendment prohibits only *unreasonable* searches. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *South Dakota v. Opperman*, 428 U.S. 364, 372-73, 96 S.Ct. 3092, 3098-99, 23 L.Ed.2d 1000, 1007 (1976), quoting the dissenting opinion of Justice Black in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).[1].

I can no more imagine Thomas Jefferson or James Madison acting judicially and favorably entertaining a motion to suppress a similarly found pistol in a tavern in Virginia in the 1790s than I can conceive that a nation so recently descended from Plymouth Rock and Ellis Island requires the application of such a broad and monolithic exclusionary rule to protect the right of domestic and work-place privacy. To me, the application of an exclusionary rule under circumstances like these and in absence of statutory directive represents an artificial and elitist notion of pluperfect justice, rather than the common man's quest for equal justice

1. Justice Black stated in his dissent in *Coolidge* that the test of the reasonableness of a search cannot be fixed by "per se rules." 403 U.S. at 509-510. Cases such as *Mincey* indicate to the contrary. The tendency toward formulation of per se rules, at least in some areas carried with it the potential for cutting full inquiry and justice off at the pass. *See, e.g., Arizona v. Maricopa County Medical Society*, _____ U.S. _____, 102 S.Ct._____, 73 L.Ed.2d 48 (1982).

under law. When one considers that the issuance of a search warrant in a case of this nature would be or at least should be immediately obtainable as a matter of right, it seems to me slavish elevation of formality over substance to hold that this inevitably discoverable [2] weapon cannot be introduced into evidence in the homicide prosecution. And even if the search is to be deemed unreasonable, the interest of society in the orderly and complete presentation of the State's case seems to me under the facts here to outweigh grossly any interests favoring suppression. I realize, however, that these considerations are foreclosed by a fair reading and application of the *Mincey* decision and by *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), allocated to the moving defendant the burden of showing "standing." While *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) changed the focus of inquiry to whether the defendant had a reasonable or legitimate expectation of privacy, the burden of showing the affirmative of this entitlement logically remains with the defendant. *See Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *United States v. Smith*, 621 F.2d 483 (2nd Cir. 1980), U.S. *cert den.* 449 U.S. 1086 (1981); *United States v. Miller*, 636 F.2d 850 (1st Cir. 1980).

Appellee did not assert that he was an owner of the business. Rather, he acknowledged that Grace Gillespie owned the business. Appellee declined to assert that he was the manager. He described himself as the "head bartender."

2. The ceiling tile was askew and a cloth material was hanging down from it.

Critically, however, the premises in question is a bar, what the English have for years called a public house, or "pub." The bar was open to the public and it appears clear from the briefs and record before us that the dropped ceiling in question was in the public barroom portion of the premises and therefore presumably within open and obvious public view.

A number of the cases involving the assertability of a protectable interest in business premises are discussed in 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.3(d) (1978). *Mancusi v. DeFort*, 398 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) is a leading case. The focus in business premises cases is sometimes different from that in cases involving residential premises and frequently involves an inquiry into the degree to which others and especially the public are excluded from an area where work is performed.

In *State v. Williams*, 84 N.J. 217, 417 A.2d 1046 (1980), the court upheld the defendant's standing to assert a Fourth Amendment violation where the defendant was the custodian of a tavern and the objectionable search took place in a storage room where he kept his tools. The court took pains to note that the area was not open to the public.

As the majority notes, that question before us is two-fold: first, whether the individual exhibits an actual or subjective expectation of privacy; and second, whether the subjective expectation of privacy is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

Here, I can readily agree with the majority that the defendant exhibited a subjective expectation of privacy. I disagree, however, that the second prong of the test has been met. Had the defendant chosen the

cash register or perhaps a drawer or cupboard or other receptacle behind the bar in which to place the weapon, I could well agree that his expectation of privacy was reasonable and should be honored. But on the record as it is developed here, the question is whether one has a reasonable expectation of privacy in or behind the openly visible "skin" or lining of a public barroom. On the record here, I cannot answer that question in the affirmative. It seems to me that the defendant's use of the publicly visible ceiling stands out like a sore thumb, and negatives the reasonable expectation of privacy that would attach to other parts of the premises.

United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982), cited by the majority, involved a temporary residence, i.e., a motel room. The public had not right to be present in and observe the room, or its bathroom.

I agree with the majority in their disposition of the hypnosis issue, and in their conclusion that appellee's motion to suppress was timely. I disagree with and dissent from the majority's conclusion that the gun must be suppressed.

RICHARD M. DAVIS, Judge *pro tempore*

NOTE: The Honorable Richard M. Davis, a Judge *pro tempore* of a court of record, has been authorized to participate in this matter by the Chief Justice of the Arizona Supreme Court, pursuant to Arizona Const. art. VI, § 20.

APPENDIX B

In the Court of Appeals
State of Arizona, Division One, Department B

Order denying State's Motion for Rehearing

STATE OF ARIZONA,

Appellant,

vs.

RICHARD F. YOUNG,

Appellee,

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1 CA-CR 4956

DEPARTMENT B

MARICOPA County Superior Court No. CR-106652

The appellant, State of Arizona, has filed a motion for rehearing. An objection thereto was filed by the appellee, Richard F. Young. The motion for rehearing and response having been considered by the court, Judges Eino M. Jacobson and Sarah D. Grant and Judge *pro tempore* Richard M. Davis participating.

IT IS ORDERED denying said motion.

Judge Davis would grant the motion on the limited grounds set forth in his dissenting opinion.

The appellee, Richard F. Young, has filed a motion to strike scurrilous statements from the pleadings to which the state has responded. The motion, response and reply having been considered by the court, Judges Eino M. Jacobson, Sarah D. Grant and Judge *pro tempore* Richard M. Davis participating.

IT IS ORDERED denying said motion.

DATED this 28th day of February, 1983.

APPENDIX C

Supreme Court
State of Arizona

Order denying State's Petition for Review

STATE OF ARIZONA,

Appellant

vs.

RICHARD F. YOUNG,

Appellee

March 30, 1983
Supreme Court No. 5836-PR
Court of Appeals No. 1 CA-CR 4956
Maricopa County No. CR-106652

The following action was taken by the Supreme Court of the State of Arizona on March 29, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED.

Justices James Duke Cameron and Stanley G. Feldman voting to grant."

Recorded returned to the Court of Appeals, Division One, Phoenix, this 30th day of March, 1983.

APPENDIX D

Order granting defendant's Motion to Suppress
in the
Superior Court
of
Maricopa County, State of Arizona

STATE OF ARIZONA,

Appellant

vs.

RICHARD F. YOUNG,

Appellee

Maricopa County No. CR-106652

Order granting defendant's Motion to Suppress,
Dated: August 14, 1980.

County Attorney by:
Herb Williams

Thomas Thinnes

Dated: September 15, 1980

RUFUS C. COULTER, JR.
Judge